CEMERLANG LAND SDN BHD v. ALI SAAT & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEALS NO: W-01(A)-412-10-2016,
W-01(A)-415-10-2016 & W-01(A)-417-10-2016]
1 AUGUST 2017

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash decision of Tribunal Tuntutan Pembeli Rumah ('Tribunal') – Development project of apartment abandoned and first agreement revoked – House buyer entered into second agreement upon revival of project – Tribunal awarded compensation for late delivery of apartment unit under first agreement – Whether complaint filed within 12 months from date of termination of first agreement – Whether decision of Tribunal tainted with illegality, irrationality or procedural impropriety – Whether Tribunal acted in excess of jurisdiction – Housing Development (Control and Licensing) Act 1966, s. 16N(2)*

The appellant, a housing developer, entered into a sale and purchase agreement on 25 June 2002 ('the first agreement') for the sale of a unit of apartment at Amber Court, Desa Larkin, Johor ('Amber Court project') at the price of RM25,000. Unfortunately, the Amber Court project could not be completed within the period stipulated in the first agreement and was subsequently declared and classified as an abandoned project by Jabatan Perumahan Negara. In view of reviving the housing project, the appellant was appointed as the developer by the relevant authorities. The original purchasers of the abandoned project, including the respondent, were offered by the appellant to participate in the revived project. A deed of revocation was executed between the parties whereby it was mutually agreed that the first agreement be revoked and rescinded and treated as null and void. Thereafter, a new sale and purchase agreement dated 9 July 2013 ('the second agreement') was executed between the appellant and the respondent and the purchase price of the new unit remained at RM25,000. The revived project was completed and vacant possession was duly handed over within the time stipulated in the second agreement. Sometime in 2014, the respondent filed a claim against the appellant with the Tribunal Tuntutan Pembeli Rumah ('Tribunal') for late delivery of the unit purchased under the first agreement. The Tribunal awarded compensation for late delivery of vacant possession to the respondent. Dissatisfied, the appellant filed an application for judicial review in the High Court. The Judicial Commissioner ('JC') dismissed the judicial review application, finding that the Tribunal did not commit any serious errors of law in its decision.

Held (allowing appeal; setting aside order of High Court)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) In exercising judicial review powers, the JC must examine the decision of the Tribunal not only in relation to the process, but also for substance in order to ascertain if such decision was tainted with illegality, irrationality or procedural impropriety. It is trite law that courts should not reverse an award of a Tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a Tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded. (paras 17 & 36)

(2) Section 16N(2) of the Housing Development (Control and Licensing) Act 1966 ('the Act') requires the respondent, as a house buyer, to file the complaint 12 months from the date of termination of the first agreement. The purchaser's right of action for damages for breach of contract, following the general rule, accrued on 24 June 2005, when the appellant failed to deliver vacant possession as stipulated under the first agreement. However, the respondent did not file any complaint to the Tribunal within the time provided under the Act. The complaint for late delivery under the first agreement was only filed after the execution of the second agreement and the handing over of the property to him. (paras 23-25)

(3) The JC had ignored the issue of jurisdiction of the Tribunal. Under the Act, the Tribunal can only consider the complaint if it was made within the time stipulated and that the Tribunal can only award compensation for late delivery. The respondent herein had benefitted from the transaction, as he was not only given vacant possession of the unit which he bought under the second agreement with the same purchase price, but the deposit paid under the first agreement was also refunded to him. In the circumstances, the decision of the Tribunal ought to be set aside on the grounds that it was irrational and unreasonable. The Tribunal had acted in excess of its jurisdiction as the complaint was made after the second agreement and the deed of revocation were executed. (paras 37 & 38)

***Bahasa Malaysia** Headnotes*

Perayu, pemaju perumahan, memasuki perjanjian jual beli pada 25 Jun 2002 ('perjanjian pertama') untuk jualan sebuah unit pangsapuri di Amber Court, Desa Larkin, Johor ('projek Amber Court') pada harga RM25,000. Malangnya, projek Amber Court tidak dapat diselesaikan dalam tempoh yang dinyatakan dalam perjanjian pertama dan kemudian diisytiharkan dan diklasifikasikan sebagai projek terbengkalai oleh Jabatan Perumahan Negara.

Bagi menghidupkan semula projek perumahan itu, perayu dilantik sebagai pemaju oleh pihak berkuasa yang relevan. Pembeli-pembeli asal projek terbengkalai itu, termasuk responden, ditawarkan oleh perayu untuk mengambil bahagian dalam projek yang dihidupkan semula. Surat ikatan pembatalan dimeterai antara pihak-pihak di mana dipersetujui bersama-sama bahawa perjanjian pertama dibatalkan dan dianggap batal dan tidak sah. Kemudian, satu perjanjian jual beli baharu bertarikh 9 Julai 2013 ('perjanjian kedua') dimeterai antara perayu dan responden dan harga belian unit baharu kekal RM25,000. Projek yang dihidupkan disempurnakan dan milikan kosong diserahkan dengan sewajarnya dalam tempoh masa yang dinyatakan dalam perjanjian kedua. Kira-kira pada 2014, responden memfailkan tuntutan terhadap perayu dengan Tribunal Tuntutan Pembeli Rumah ('Tribunal') bagi penyerahan lewat unit yang dibeli bawah perjanjian pertama. Tribunal mengawardkan pampasan bagi penyerahan lewat milikan kosong kepada responden. Tidak berpuas hati, perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi. Pesuruhjaya Kehakiman ('PK') menolak permohonan semakan kehakiman, dengan dapatan bahawa Tribunal tidak melakukan apa-apa kekhilafan serius dari segi undang-undang dalam keputusannya.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Dalam melaksanakan kuasa semakan kehakiman, PK mesti memeriksa keputusan Tribunal bukan sahaja berkaitan dengan proses, malahan bagi kandungannya untuk memastikan sama ada keputusan tersebut dicemari oleh ketaksahan, ketakrasionalan atau kesalahan prosedur. Undang-undang matan adalah mahkamah tidak wajar mengakas award Tribunal kecuali kekhilafan bidang kuasa jelas terbukti. Kekhilafan bidang kuasa timbul apabila Tribunal tidak bertindak dalam ruang lingkup fungsi statutorinya dengan sepatutnya seperti sama ada ia bertindak tanpa keterangan yang mencukupi atau tiada langsung keterangan, atau tersalah tanggap undang-undang yang menjadi asas keputusannya.

(2) Seksyen 16N(2) Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') memerlukan responden, sebagai pembeli rumah, memfailkan aduan 12 bulan dari tarikh penamatan perjanjian pertama. Hak pembeli bagi tindakan untuk ganti rugi terhadap pelanggaran kontrak, menurut kaedah am, terakru pada 24 Jun 2005, apabila perayu gagal menyerahkan milikan kosong seperti yang termaktub dalam perjanjian pertama. Walau bagaimanapun, responden tidak memfailkan apa-apa aduan dengan Tribunal dalam tempoh masa yang diperuntukkan dalam Akta. Aduan penyerahan lewat bawah perjanjian pertama hanya difailkan selepas pemeteraian perjanjian kedua dan penyerahan hartanah tersebut kepadanya.

(3) Pesuruhjaya Kehakiman tidak mengendahkan isu bidang kuasa Tribunal. Bawah Akta, Tribunal hanya boleh mempertimbangkan aduan jika ia dibuat dalam tempoh masa yang dinyatakan dan Tribunal hanya boleh mengawardkan pampasan bagi penyerahan lewat. Responden di sini mendapat faedah daripada transaksi tersebut, kerana dia bukan sahaja diberikan milikan kosong unit tersebut yang dibelinya bawah perjanjian kedua dengan harga belian yang sama, malahan deposit yang dibayar bawah perjanjian pertama juga telah dikembalikan kepadanya. Dalam keadaan tersebut, keputusan Tribunal wajar diketepikan atas alasan-alasan bahawa ia tidak rasional dan tidak munasabah. Tribunal bertindak melampaui bidang kuasanya kerana aduan tersebut dibuat selepas perjanjian kedua dan surat ikatan pembatalan dimeterai.

Case(s) referred to:

Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294 HC ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Regina v. HM Coroner for Inner London South District, ex parte Douglas-Williams CA [1999] 1 All ER 344 ***(refd)***

Shaw v. Applegate [1977] 1 WLR 970 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, s. 8A
Housing Development (Control and Licensing) Regulations 1989, reg. 11(3)

For the appellant - Rajashnee Suppiah; M/s Mei Fun & Rajashree
For the respondent - Mohd Fairuz Abdullah; M/s Mohd Najid & Partners

[Editor's note: For the High Court judgment, please see Cemerlang Land Sdn Bhd lwn. Abdul Rahim Khairuldin & Yang Lain & Kes Lain [2016] 1 LNS 1384 (overruled).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim JCA:

Introduction

[1] There were three appeals before us arising from three applications for judicial review in the High Court emanating from one judgment of the learned Judicial Commissioner. They involved different respondents but the same applicant (appellant) and were all heard together. The three appeals

were against the decision of the learned Judicial Commissioner dismissing the appellant's application for judicial review. The appellant had applied for an order of *certiorari* to quash the decision of the President of the Tribunal Tuntutan Pembeli Rumah ("the tribunal") made on 26 January 2015 ('the award'). The Tribunal had on the said date awarded the respondents damages for late delivery of vacant possession by the appellant. The appellant, dissatisfied with the decision of the learned Judicial Commissioner appealed to this court.

[2] We heard the appeal on 27 March 2017. After due deliberation and having carefully considered the submissions of both parties we found that there are merits in the appeals and allowed all the appeals with costs. We propose to give reasons for our decisions with respect to all the appeals in one common judgment. Since the facts are common for all the three appeals, for purposes of this judgment, we will only be referring to the facts in Appeal No: W-01(A)-412-10-2016, which parties had agreed to refer in their submissions.

Material Facts

[3] The background facts are important to understand the context in which these appeals were brought. The appellant, is a company incorporated in Malaysia and is a housing developer previously known as Genting Unggul Sdn Bhd. The respondent entered into a sale and purchase agreement dated 25 June 2002 ("the first agreement") with the appellant to purchase one apartment unit described as No. AC-03-02 at Amber Court, Desa Larkin, Johor ('Amber Court Project'). The purchase price of the said unit was RM25,000. Clause 22 of the first agreement stipulates that the handing over of vacant possession of the unit shall be within thirty-six (36) months from the date of the aforesaid agreement.

[4] The Amber Court Project consists of five blocks of 700 units of low cost flats ie, Blocks A-E. Under the first agreement the respondent's unit was located on the 3rd floor Block C. Unfortunately, the Amber Court Project could not be completed within the period stipulated in the said agreement. On 31 December 2005 the Jabatan Perumahan Negara declared and classified the Amber Court Project as an abandoned project.

[5] However, steps were undertaken by the authorities to revive the abandoned project. Subsequently a new development order was issued to revive the project and to build "…179 Unit Rumah Teres 2 ½ Tingkat di atas Lot 20203, Jalan Merak dan 3 Blok Rumah Pangsa 5 Tingkat (248 Unit Rumah Kos Rendah 650 kaki persegi di atas Lot PTB 20184, Jalan Rajawali, Mukim Larkin, Johor.' In 2014 the Jabatan Perumahan Negara after having classified the housing project as 'Projek Perumahan Bermasalah di Negeri Johor' took steps to revive the housing project under the PR1MA Scheme. The appellant was appointed as the developer of the said project by the relevant authorities.

[6] The original purchasers of the abandoned project (including the respondent) were offered by the appellant to participate in the said revived project. Sometime in 2010 the respondent was offered by the appellant to purchase one unit of the low cost flat known as Project Larkin Court 1 ie, Unit A-2-1 Blok A Tingkat 2 Rumah Pangsa No.1. By a letter of acceptance the respondent accepted the offer and agreed to revoke the first agreement.

[7] A deed of revocation dated 9 July 2013 was executed between the parties whereby it was mutually agreed to revoke and rescind the first agreement and to treat the said agreement as null and void:

> 1. In consideration of the premises herein the parties hereto mutually agree to revoke and rescind the sale and Purchase Agreement as null and void.

[8] A new sale and purchase agreement dated 9 July 2013 was drawn up and executed between the appellant and the respondent ("the second agreement'). The purchase price of the new unit remained at RM25,000 and the completion date as stipulated in the said agreement is within three months from the date of the said second agreement.

[9] The said revived project was completed and vacant possession of the unit was duly handed over to all the purchasers including the respondent within the time stipulated in the aforesaid second agreement.

[10] Sometime in 2014, the respondent filed a claim against the appellant with the tribunal for late delivery of the unit he purchased under the first agreement. The tribunal awarded to the respondent compensation for late delivery of vacant possession. Dissatisfied with the decision of the tribunals the appellant filed the judicial review in the High Court.

The Tribunal

[11] The decision of the President can be found at pp. 295-335 of the appeal records. He concluded that the second agreement together with the deed of revocation were executed without the approval of the Jabatan Perumahan Negara and that the second agreement executed by the parties was not in accordance to the agreement as prescribed in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('HDR'). Regulation 11 of HDR provides as follows:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

[12] The President of the tribunal opined that the first agreement can only be terminated in accordance to s. 8A of the Housing Development (Control and Licensing) Act 1966 ("the Act") and concluded that the revocation of the first agreement as well as the execution of the second agreement were null and void as they were not in accordance with the requirement of the law. The appellant was, therefore, still bound by the terms and conditions of the first agreement. Furthermore, the appellant failed to obtain the approval of the Jabatan Perumahan Negara as required under reg. 11(3) of the HDR. He explained in his written findings as follows:

> 52. Selaras dengan dapatan Tribunal keatas Isu-Isu (i), (ii) dan (iii) diatas, Tribunal mendapati bahawa penghujahan-penghujahan yang dikemukakan oleh Responden seperti dinyatakan dalam perenggan 26 (i), (ii) dan (vi) di atas adalah tidak berasas dan adalah ditolak atas alasan bahawa:
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> (i) Responden tidak boleh menamatkan sesuatu perjanjian jual beli rumah melainkan selaras dengan peruntukan 8A Akta 118 dan Peraturan dibawahnya;
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> (ii) Pembatalan Perjanjian Pertama dan pemeteraian Surat Indemniti, Surat Kuasa dan Perjanjian Kedua tanpa kelulusan atau kebenaran khas oleh JPN di bawah Peraturan 11(3) adalah tidak sah kerana ia merupakan suatu perbuatan berkontrak keluar daripada peruntukan khusus Akta 118 dan Peraturan dibawahnya. Responden adalah masih terikat dengan syarat-syarat Perjanjian Pertama untuk menyerahkan milikan kosong rumah dan kemudahan kemasyarakatan yang dibeli oleh Pemohon di bawah Perjanjian Pertama dalam tempoh 36 bulan dari tarikh Perjanjian Pertama ditandatangani;
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> (iii) Sekiranya Responden, sebagai kontraktor penyelamat, hendak mengecualikan dirinya daripada membayar ganti rugi yang ditentukan atas kelewatan menyerahkan milikan kosong rumah dan kemudahan kemasyarakatan di bawah projek yang terbengkalai kepada Pemohon dan pembeli-pembeli lain, Responden hendaklah memohon dan mendapatkan kebenaran khas sedemikian daripada JPN di bawah Peraturan 11 (3) Peraturan Pembangunan Perumahan (Kawalan dan Pelesenan)1989 …

[13] The President concluded that the respondent's claim for compensation for late delivery was not time barred. The appellant failed to hand over vacant possession to the respondent under the first agreement and there was therefore a delay of 3111 days calculated from 25 June 2005 until 31 December 2013.

The High Court

[14] The learned Judicial Commissioner dismissed the judicial review application as he found that the President of the Tribunal did not commit any serious errors of law in arriving at his award. The respondent had no other

remedy as a result of the breach of the first agreement by the appellant. He was of the considered view that if an order for *certiorari* was granted the appellant would not be responsible for the breach of the agreement for the failure of not handing over vacant possession as stipulated in the first agreement. In his grounds of judgment the learned Judicial Commissioner said this when refusing judicial review:

> [20] Pada pendapat mahkamah ini:
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> (a) mengikut autoriti kes *Law Pang Ching & Ors v. Tawau Municipal Council*, oleh kerana pihak pemohon sebagai pemaju projek perumahan telah melanggar terma kontrak-kontrak yang diikat pada tahun 2002, mahkamah ini tidak akan melaksanakan budi bicaranya bagi membantu pemohon, sekalipun jika terdapat kekhilafan undang-undang pada keputusan Presiden yang terpelajar; dan
>
> (b) mengaplikasikan formula yang digubal oleh Lord Woolf MR dalam kes *exparte Douglas-Williams (supra)*, suatu perintah *certiorari* tidak menjadi wajar atau perlu demi kepentingan keadilan, kerana dalam kes ini, responden-responden tiada remedi lain terhadap perlanggaran kontrak oleh pihak pemohon berkenaan dengan persetujuan tahun 2002, seperti yang pihak pemohon sendiri akui. Jika perintah *certiorari* diberikan kepada pemohon, ini akan bermakna bahawa pemohon tidak perlu menanggung akibat perlanggaran kontraknya sendiri.

The Appeal

[15] Before us, learned counsel for the appellant submitted that the award made by the President of the tribunal was wrong and could not be sustained in law and that the learned Judicial Commissioner had erred in upholding the said award. It was submitted that in the light of the facts and the circumstances of the case put forth before the tribunal, the decision arrived at was tainted with illegality and irrationality. The President had taken into account irrelevant considerations, failed to take into account relevant considerations and material facts and had acted against the weight and totality of the evidence.

[16] The Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 held that the decision of the inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality and the courts are permitted to scrutinise such decisions not only for process but also for substance.

[17] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded. (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317).

[18] As Gopal Sri Ram JCA (as he then was) said in *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248 at p. 269:

> ... where the exercise of a decision is challenged on grounds of vires that is illegality, or unreasonableness, the Court is not confined merely to the decision-making process, but may examine the merits of the decision itself.

[19] We are further guided by what was stated in the Federal Court case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 at p. 348:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, are so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greater London Council and Anor* [1983] 1 AC 768 at 821).

[20] It is trite law that *certiorari* will lie to quash a decision made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority. For a decision to be quashed on judicial review, there must first be a decision by a decision maker, and the said decision affected the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[21] The court must review the decision in order to determine the basis of a material mistake of fact on the part of the person who made the decision or where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper process, or where the functionary misconceived the nature of the discretion conferred upon him and took into consideration irrelevant issues or ignored relevant ones.

[22] In the instant appeal the functions, powers and jurisdiction of the Tribunal are spelt out in the Act. Section 16N(2) of the Act provides for the limitation to the jurisdiction of the Tribunal as follows:

A (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from:

(a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;

(b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or

C (c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later.

D **[23]** Section 16N(2) of the Act requires the respondent as a house buyer to file the complaint 12 months from the date of termination of the sale and purchase agreement which would be the first agreement. The essential facts to be considered is that under the first agreement dated 25 June 2002 it was clearly provided by cl. 22 of the said agreement, as follows:

E 22(1) Vacant possession of the said Parcel to which the water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement; and

(2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said F Parcel in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[24] It was common ground that the unit was not completed and available for delivery as provided under agreement. The purchaser's right of action for G damages for breach of contract, following the general rule, accrued on the date of the breach, which in this case was the day after the time limited under clause 22, that is to say, on 24 June 2005 when the appellant failed to deliver vacant possession as stipulated under the first agreement.

H **[25]** The respondent, however did not file any complaint to the tribunal within the time as provided under the Act. The complaint for late delivery under the first agreement was only filed after the execution of the second agreement and the handing over of the property to him.

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[26] By the deed of revocation the respondent had agreed to revoke and rescind the first agreement and to treat the said agreement as null and void subject to and upon the terms and conditions as agreed. It was also agreed that the progressive amount (ie, the deposit of RM2,500) paid by the respondent to the developer shall be refunded.

[27] Counsel for the appellant argued that in the present appeals the cause of action arose in the year 2005 which was the earliest instance when the respondent has a complete cause of action where all the material facts to be proved has happened. It is further submitted that the cause of action under the first agreement due to the failure to deliver vacant possession arose in year 2005. However, the parties had mutually revoked the first agreement and executed the second agreement whereby the unit purchased by the respondent was duly handed over.

[28] The President of the tribunal was also fully aware and conscious of the fact that the respondent had by the deed of revocation revoked the first agreement which was the basis of his complaint to the Tribunal the jurisdiction of the Tribunal that is, to hear and determine a homebuyer's claim arising out of a sale and purchase agreement entered into by the parties. He was also aware that the unit as described under the second agreement was handed over to the respondent within the time stipulated.

[29] This court is guided by the principles enunciated in the case of *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294. The facts of the case are almost similar to the facts in the appeal before us. The plaintiffs in that case were purchasers of houses developed by the first defendant under sale and purchase agreements entered into between the plaintiffs and the first defendant. The first defendant, however was unable to complete the project and the second defendant took over and completed the project. The court held that the second defendant decided to take over the project and built the houses according to more expensive specifications. The plaintiffs had all gained and enjoyed the benefit of such specifications. The court held that the plaintiffs were not entitled to claim liquidated damages for late delivery of the houses against the second defendant. His Lordship Peh Swee Chin J referred to the principles in the case of *Shaw v. Applegate* [1977] 1 WLR 970 in which Justice Buckley LJ held as follows:

> ... the real test, I think, must be whether upon the facts of the particular case, the situation has become such, that it would be dishonest or unconscionable for the plaintiffs or the person having the right sought to be enforced, to continue to seek to enforce it.

[30] Relying on this principle, His Lordship held as follows:

> The extraordinary situation described above was such that it would be unconscionable for the plaintiffs to insist on strictly enforcing the obligation providing for the payment of the said liquidated damages for late delivery of houses, and it was for this Court to decide how an equity should be satisfied.

[31] We find that that the learned Judicial Commissioner had misdirected himself when he said in his written judgment:

> Jika sekalipun terdapat apa-apa kekhilafan dari segi undang-undang yang telah dilakukan oleh Presiden tribunal terpelajar, ianya tidak akan sama sekali menjejaskan keputusan untuk menolak permohonan *certiorari* yang dipinta. Oleh yang demikian, tidak perlu lagi mahkamah ini mempertimbangkan hujahan-hujahan peguam pemohon yang mendakwa bahawa Presiden Tribunal telah terkhilaf dari segi undang-undang.

[32] In his grounds of judgment the learned Judicial Commissioner said:

> (b) mengaplikasikan formula yang digubal oleh Lord Woolf MR dalam kes *ex parte Douglas-Williams (supra)*, suatu perintah *certiorari* tidak menjadi wajar atau perlu demi kepentingan keadilan, kerana dalam kes ini, responden-responden tiada remedi lain terhadap perlanggaran kontrak oleh pihak pemohon berkenaan dengan persetujuan tahun 2002, seperti yang pihak pemohon sendiri akui. Jika perintah *certiorari* diberikan kepada pemohon, ini akan bermakna bahawa pemohon tidak perlu menanggung akibat pelanggaran kontraknya sendiri.

[33] With respect, we do not agree with the reasoning of the learned Judicial Commissioner that when it comes to exercising its discretion the test for the court to apply when deciding whether it should give relief is that it should be necessary or desirable to do so in the interest of justice. The facts of the case of *Regina v. HM Coroner for Inner London South District, ex parte Douglas-Williams CA* [1999] 1 All ER 344 relied on by the learned Judicial Commissioner can be distinguished. In *ex parte Douglas-Williams* the deceased died in custody. The jury returned a verdict of accidental death and it was suggested that the coroner's direction as to unlawful killing had been confusing, and that he was wrong not to leave open the possibility of a verdict of neglect. Lord Woolf MR in his judgment explained as follows:

> The conclusion I have come to is that, so far as the evidence called before the jury is concerned, a coroner should adopt the *Galbraith* approach in deciding whether to leave a verdict. The strength of the evidence is not the only consideration and in relation to wider issues, the coroner has a broader discretion. If it appears there are circumstances which, in a particular situation, where in the judgment of the coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is

technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict.

[34] The facts in the instant appeal are far from similar. The laws applicable, are also different. The relevant legislations in this appeal are the Housing Developers (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989. The Act provides for the control and licensing of the business of housing development, the protection of the interest of purchasers and for matters connected therewith. It confers the Tribunal, amongst others, the jurisdiction to hear claims for late delivery. There is also the issue of the second agreement entered into between the appellant and the respondent revoking the first agreement.

[35] In our view, the learned Judicial Commissioner had committed a grave error when he applied the principle formulated by Lord Woolf MR in the case of *ex parte Douglas-Williams (supra)* and brushed aside the facts and the law applicable before him. He decided not to consider the submission of the applicant whether there was an error on the part of the Tribunal and not to determine as well as to identify the error, if at all committed by the Tribunal.

[36] As a judge, in exercising judicial review powers, the Judicial Commissioner must examine the decision of the Tribunal not only in relation to the process, but also for substance in order to ascertain if such decision was tainted with illegality, irrationality or procedural impropriety within the principles amongst others outlined in the case of *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 3 All ER 935; *Rama Chandran v. Industrial Court of Malaysia & Anor (supra)* and *Ranjit Kaur a/p S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra).*

[37] It is an undisputed fact that the respondent had executed the deed of revocation revoking the first agreement and then executed the second agreement. The Judicial Commissioner had ignored the issue of jurisdiction of the tribunal. Under the Act the tribunal can only consider the complaint if it was made within the time stipulated and that the tribunal can only award compensation for late delivery. The respondent had benefitted from the transaction as he was not only given vacant possession of the unit which he bought under the second agreement with the same purchase price but the deposit paid under the first agreement was refunded to him.

[38] We agree with the submissions of the appellant's learned counsel that the decision of the President of the tribunal ought to be set aside on the grounds that the decision is irrational and unreasonable. The tribunal had also acted in excess of its jurisdiction as the complaint was made after the second agreement and the deed of revocation were executed. In the light of

A the facts and the factual matrix of the circumstances, we are satisfied that the decision of the President of the tribunal when looked at objectively, is devoid of any plausible justification that no reasonable person or body of persons could have come to. On this ground alone, the appeal ought to be allowed.

B **[39]** Thus, for the reasons given, we were of the unanimous view that the appeal must be allowed. The order of the High Court was set aside. We made no order as to cost. The deposit was refunded.

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